Chong Sze Kean v Timbalan Menteri Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–24–16 OF 2011
ROHANA YUSUF J
20 APRIL 2011

Emergency Legislation — Restriction order — Validity of order — Applicant challenged validity of restriction order — Whether there was procedural non-compliance in restriction order made against applicant — Whether Minister failed to consider report on circumstances of arrest and detention of applicant — Whether applicant's arrest and detention in accordance with law — Emergency Public (Order and Prevention of Crime) Ordinance 1969 ss 3(3)(a), (b), (c), 4(1), 4A(1) & 11

The applicant was released and then rearrested pursuant to a restriction order ('RO') for a period of two years issued by the Minister under s 4A(1) of the Emergency Public (Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The applicant was detained for 21 days before this RO was issued. This was the applicant's application for a declaration that the RO was null and void and of no effect. The applicant challenged the RO on the grounds that there was non-compliance with s 3(3)(c) of the Ordinance. According to the applicant the Minister had failed to consider a report on the circumstances of the arrest and detention of the applicant before issuing the RO. The applicant submitted that there must be strict compliance with s 3(3)(c) of the Ordinance before a RO under s 4(1) could be validly issued. The respondent did not dispute the facts but maintained that there was no necessity for a report on the circumstances of arrest and detention to be made under s 3(3)(c) of the Ordinance in the present case because the detention did not exceed 30 days. The sole issue for consideration in this case was whether there was a procedural non-compliance in the restriction order made against the applicant.

Held, dismissing the applicant's application with no order as to costs:

(1) The power of the Minister to issue the RO under s 4A(1) of the Ordinance was based on the same purpose as his power to issue a detention order ('DO') under the Ordinance and hence the requirement would be the same. For the purposes of achieving the objectives of the Ordinance the Minister may issue a DO under s 4(1) or RO under s 4A(1) for a period of two years. In situations which necessitate an arrest without warrant or detention pending enquiries of any person being made there are safeguards provided in provisos (a)–(c) to s 3(3) and these safeguards are provided in tandem with the length of detention. Since

these provisos dealt with safeguards afforded to a person when he was arrested without a warrant or was detained pending enquiries, they did not have any relation to the issuance of a DO under s 4(1) or RO under s 4A(1) of the Ordinance. The reports required under s 3(3)(c) of the Ordinance were meant to justify the arrest without warrant and the length of detention pending enquiries and not for the purpose of justifying the issuance of a DO or RO. The Minister was at liberty to issue a DO or RO based on information furnished to him by any source or means. In the present case, the RO was issued upon the Minister being satisfied that the RO was for the purpose of achieving the objectives of the Ordinance and thus the applicant's arrest and detention were in accordance with the law. Further, the applicant was detained for less than 30 days and the safeguards afforded by s 3(3)(a) and (b) of the Ordinance were afforded to him. Proviso (c), which is referred to by the applicant in this case, only applied to a person who is detained for longer than 30 days and as his detention was less than 30 days, s 3(3)(c) of the Ordinance had no application and there was no necessity for any report on the circumstances of arrest and detention (see paras 3, 6, 8–10).

(2) The facts of the present case were different from the Federal Court case of *Sugu Nadaraja v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2011] 2 CLJ 369, in that the Minister in the present case deposed that there was no report under s 3(3)(c) that he relied upon. In fact in the present case, the Minister issued the RO based on the report given to him, which he was not at liberty to disclose in the light of s 11 of the Ordinance as well as art 151(3) of the Federal Constitution (see paras 11–13).

[Bahasa Malaysia summary

Pemohon telah dibebaskan dan kemudian ditangkap semula menurut perintah sekatan ('PS') selama dua tahun yang dikeluarkan oleh Menteri di bawah s 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Pemohon telah ditahan selama 21 hari sebelum PS ini dikeluarkan. Ini adalah permohonan pemohon untuk deklarasi bahawa PS itu adalah terbatal dan tak sah dan tidak berkuatkuasa. Pemohon mencabar PS tersebut atas alasan bahawa tiada pematuhan s 3(3)(c) Ordinan. Menurut pemohon Menteri telah gagal untuk mengambilkira laporan berhubung cara tangkapan dan tahanan pemohon sebelum mengeluarkan PS tersebut. Pemohon berhujah bahawa perlu ada pematuhan s 3(3)(c) Ordinan sebelum PS di bawah s 4(1) boleh dikeluarkan dengan sah. Responden tidak mempertikaikan fakta tetapi menegaskan bahawa tiada keperluan membuat laporan tentang cara tangkapan dan tahanan di bawah s 3(3)(c) Ordinan tersebut dalam kes ini kerana tahanan tidak melebihi 30 hari. Isu utama untuk dipertimbangkan dalam kes ini adalah sama ada terdapat ketidakpatuhan prosedur dalam perintah sekatan yang dibuat terhadap pemohon.

Diputuskan, menolak permohonan pemohon tanpa perintah berhubung kos:

(1) Kuasa Menteri untuk mengeluarkan PS di bawah Ordinan adalah

berdasarkan tujuan sama seperti kuasanya untuk mengeluarkan perintah tahanan ('PT') di bawah Ordinan tersebut dan justeru itu keperluan adalah sama. Bagi tujuan mencapai objektif Ordinan Menteri boleh mengeluarkan PT di bawah s 4(1) atau s 4A(1) bagi tempoh dua tahun. Dalam keadaan yang memerlukan tangkapan tanpa waran atau tahanan sementara menunggu siasatan selesai terhadap seseorang itu maka terdapat perlindungan yang diperuntukkan dalam proviso (a)–(c) kepada s 3(3) dan perlindungan ini diberikan sejajar dengan tempoh tahanan. Oleh kerana proviso tersebut memberikan perlindungan kepada seseorang apabila dia ditangkap tanpa waran atau telah ditahan sementara menunggu siasatan selesai, ia tiada kaitan dengan pengeluaran PT di bawah s 4(1) atau PS di bawah s 4A(1) Ordinan. Laporan-laporan yang dikehendaki di bawah s 3(3)(c) Ordinan bertujuan menjustifikasikan tangkapan tanpa waran dan tempoh tahanan sementara menunggu siasatan selesai dan bukan bertujuan menjustifikasikan pengeluaran PT atau PS. Menteri bebas mengeluarkan PT atau PS berdasarkan maklumat yang diberikan kepada beliau oleh apa-apa sumber atau cara. Dalam kes ini, PS telah dikeluarkan setelah Menteri berpuas hati bahawa PS itu adalah bagi tujuan mencapai objektif Ordinan tersebut dan oleh itu tangkapan dan tahanan pemohon adalah menurut undang-undang. Selanjutnya, pemohon telah ditahan kurang daripada 30 hari dan perlindungan yang diberikan oleh s 3(3)(c) dan (b) Ordinan telah diberikan kepadanya. Proviso (c), yang dirujuk oleh pemohon dalam kes ini, hanya terpakai untuk seseorang yang ditahan lebih daripada 30 hari dan oleh kerana tahanannya kurang daripada 30 hari, s 3(3)(c) Ordinan tidak terpakai dan tiada keperluan untuk apa-apa laporan berhubung cara tangkapan dan tahanan (lihat perenggan 3, 6, 8–10).

(2) Fakta kes ini berbeza daripada kes Mahkamah Persekutuan *Sugu Nadaraja v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2011] 2 CLJ 369, di mana Menteri dalam kes ini mendepos bahawa tiada laporan di bawah s 3(3)(c) yang beliau bergantung kepada. Bahkan dalam kes ini, Menteri telah mengeluarkan PS berdasarkan laporan yang diberikan kepadanya, yang mana beliau tiada kebebasan untuk mendedahkan berdasarkan s 11 Ordinan dan juga perkara 151(3) Perlembagaan Persekutuan (lihat perenggan 11–13).]

Notes

For cases on emergency legislation generally, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2195–2327.

Cases referred to

L Rajenderan R Letchuman v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653, FC (refd)

A *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)
Sugu Nadaraja v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2011] 2 CLJ 369, FC (distd)

B **Legislation referred to**
Emergency Public (Order and Prevention of Crime) Ordinance 1969 ss 3, 3(1), (2), (3)(a), (b), (c), 4, 4(1), 4A, 4A(1), 11
Federal Constitution art 151(3)

C *Suresh Thanabalasingam (Suresh Thanabalasingam) for the applicant.*
Anis Nazilia Che Abdul Rahman (Federal Counsel, Attorney General's Chambers) for the respondents.

Rohana Yusuf J:

D

[1] This is an application for a declaration that the restriction order ('RO') issued by the Minister under s 4A(1) of the Emergency Public (Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'), is null and void and of no effect. The challenge was made on the ground that there was
E non-compliance of s 3(3)(c) of the Ordinance. The alleged procedural non-compliance is said to be the failure of the Minister to consider a report on the circumstances of arrest and detention under that section before issuing the RO under s 4A(1) of the Ordinance.

F BRIEF FACTS

[2] The applicant was rearrested after his earlier release in accordance with s 3(1) of the Ordinance. On the 11 June 2010, he was issued with a RO
G pursuant to s 4A(1) of the Ordinance for a period of two years. He was detained for 21 days before the RO was issued. The respondent did not dispute the facts but maintained a case that there is no necessity for a report on circumstances of arrest and detention to be made under s 3(3)(c) since the detention did not exceed 30 days.

H

[3] Before dealing with the issue in question, it would indeed be helpful to appraise the relevant provisions of the Ordinance. At the outset it must be noted that the power of the Minister to issue the RO under the s 4A(1) is also based on the same purpose as under s 4(1) and hence the requirement would
I therefore be the same.

[4] The Ordinance is a preventive detention law that allows the Minister to issue a preventive detention order ('DO') to achieve the objectives of the Ordinance. The DO under s 4(1) may be issued by the Minister for reasons

stated therein, which are, for purposes of preventing any person from acting prejudicial to public order, for suppression of violence, or for prevention of crime involving violence. For the purpose of achieving these objectives the Minister may issue a DO under s 4(1) or RO under s 4A(1) for a period of two years respectively upon the Minister being satisfied.

[5] If however an enquiry is required before a DO is issued, s 3 of the Ordinance empowers the police to arrest and detain the person without warrant. A detention under this s 3 cannot however exceed a period of 60 days. Thus if there is reason to believe that there are grounds which would justify a detention under s 4(1), s 3(1) allows an arrest without warrant and detention pending enquiries. Section 3(2) allows an arrest without warrant and detention pending enquiries of any person who on being questioned by any police officer fails to satisfy him as to his identity or as to the purposes for which he is in the place where he is found, if the police officer suspects that person of having acted or being about to act or being likely to act in any manner prejudicial to public order. Thus if there is reason to believe that it is necessary for the suppression of violence or the prevention of crimes involving violence that person should be detained.

[6] In both situations of arrest without warrant and detention pending enquiries of any person in respect of whom there is reason to believe that there are grounds which would justify his detention under s 4(1) various safeguards are in place. These safeguards are provided in the provisos (a) to (c) to s 3(3) and they are set in accordance with the length of detention. Naturally additional safeguards are provided in tandem with the length of detention. Under proviso (a) a person may be detained for more than 24 hours, only by the authority of a police officer of or above the rank of inspector. A detention of more than 48 hours can be made only by a police officer of or above the rank of assistant superintendent. Proviso (c) comes into operation if a person is detained for a period longer than 30 days. Under proviso (c) in additional safeguards are put in place:

(a) First, there must be a report on the circumstances of arrest and detention to the IGP or a designated officer.

(b) Secondly, that report must be made by an officer of or above the rank of deputy superintendent.

(c) Thirdly, that designated officer or the IGP must forthwith report the same to the Minister.

[7] From the above, it is quite clear that, proviso (c) only applies to a person who has been detained longer than 30 days and not if the detention is for a lesser period. Thus in the event that on the 20 day of detention under s 3(2) a DO is issued under s 4(1), then the safeguard in proviso (c) shall not be

applicable and accordingly no report on circumstances of arrest and detention under that proviso is required. The requirement for a report on circumstances of arrest and detention is meant to justify a detention longer than 30 days.

[8] Since these clauses deal with safeguards of a person under arrest without warrant and detention pending enquiries, they do not have any relation to the issuance of DO under s 4(1) or RO under s 4A(1). This is also the position decided by the Federal Court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613. The Federal Court in that case held that it is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention. Here there is no stipulation under s 4 or 4A for such a condition precedent. The Federal Court in a case that followed, adopted similar approach in its decision in *L Rajenderan R Letchuman v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653.

[9] It is therefore clear that the satisfaction of the Minister under s 4(1), as in the present case, bears no relation with the reports required under s 3(3)(c). The report is, as I have said earlier, meant to justify the arrest without warrant and the length of detention pending enquiries. It is not for the purpose of justifying the issuance of a DO or RO, which ss 4(1) and 4A(1). The satisfaction of the Minister will be dependent on the outcome of the enquiries or my report that support the grounds in s 4(1). For instance, if upon completion of the enquires, there appears to be no reason justifying the issuance of a DO or RO, the person so detained may be released without further ado. This position supports the view that the Minister may issue a DO under s 4(1) or RO under s 4A(1) without any necessity of arrest without warrant and detention pending enquiries, though admittedly, it may pose practical difficulty. The Minister is at liberty to issue a DO or RO based on information furnished to him by any source or means. It may based on a report from the police through a long period of surveilance and where no enquries would be required. So long as the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, a DO or RO may be issued.

[10] Back to the facts of the present case, the applicant is detained for less than 30 days. This fact is not in dispute. The safeguards afforded by s 3(3)(a) and (b) were afforded to him. Since his detention is less than 30 days it is my opinion that s 3(3)(c) has no application, and hence there no necessity for any report on circumstances of arrest and detention. In other words, there is no necessity to justify a detention for a period less than 30 days. His arrest and

detention in my view is in accordance with the law. The RO under s 4A(1) was issued upon the Minister being satisfied that for any of the purpose mentioned in s 4(1), it is necessary that control and supervision should be exercised over the applicant or that restrictions and conditions should be imposed upon the applicant in respect of his activities, freedom of movement or places of residence and employment. The satisfaction of the Minister would have been based on the outcome of the enquiries and not the report on his arrest and detention, since there isn't any such report in this case.

[11] Learned counsel for the applicant cited the Federal Court case of *Sugu Nadaraja v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2011] 2 CLJ 369, and contended that, in that case the Federal Court held that there must be strict compliance with s 3(3)(a), (b) and (c) of the Ordinance before a detention order under s 4(1) can be validly issued. In that case a detention took place under s 3 and the detention was for less than 30 days. A report on circumstances of arrest and detention was prepared under s 3(3)(c) by DSP Sukri who is said to be not a designated officer. The Minister in his affidavit states that he relied on the case file report made by the police officer under s 3(3)(c) of Ordinance and that file report contains only the report on 'circumstances of arrest and detention' in issuing the detention order. Thus it was held by the Federal Court that since the report was not prepared by the correct authority, there was therefore a procedural non-compliance of the detention of the appellant.

[12] The facts of the present case are different. The Minister in his affidavit deposed that there was no report made under s 3(3)(c) and he therefore did not place reliance on that kind of report in the issuance of the present order against the applicant. That being so, there is no requirement for the Minister in the present case to comply with s 3(3)(c).

[13] In fact in the present case, the Minister issued the RO under s 4A(1) of the Ordinance based on the report given to him which he is not at liberty to disclose in the light of s 11 of the Ordinance as well as art 151(3) of the Federal Constitution.

[14] For the above reasons, I hereby dismiss the application of the applicant in encl 1, with no order as to costs.

Application dismissed with no order as to costs.

Reported by Kohila Nesan